No. 98-126

In the Supreme Court of the United States

OCTOBER TERM, 1998

BOARD OF TRUSTEES
OF THE UNIVERSITY OF ILLINOIS, PETITIONER

v.

JANE DOE, A MINOR, AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether an educational institution receiving funds under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, can be liable under Title IX for responding with deliberate indifference to a student's repeated complaints about severe, persistent, and pervasive sexual harassment by other students in the course of the school's education programs and activities.

2. Whether Congress's abrogation of the States' Eleventh Amendment immunity in the Civil Rights Remedies Equalization Act, 42 U.S.C. 2000d-7, was a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals and the opinions by members of the court of appeals respecting the court's denial of rehearing en banc and dissenting from that denial (Pet. App. 1-68) are reported at 138 F.3d 653. The district court's orders (Pet. App. 69-79, 80-85) are not reported.

JURISDICTION

The court of appeals entered its judgment on March 3, 1998. A petition for rehearing was denied on April 14, 1998. Pet. App. 1, 134-135. The petition for a writ of

certiorari was filed on July 13, 1998. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Jane Doe, a minor, and her parents John and Janet Doe filed this action under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, seeking damages and other relief against petitioner Board of Trustees of the University of Illinois.[1] Pet. App. 148-174. Petitioner, a recipient of federal financial assistance, operates University High School in Urbana, Illinois, where respondent was a student from August 1992 to May 1994, when she was 13 and 14 years old. *Id.* at 150, 152. Doe alleges that during her two years at University High School she was subjected to a campaign of severe and pervasive unwelcome sexual harassment by a group of male classmates, that this harassment created an intolerable hostile educational environment for her, that she and her parents complained repeatedly to school officials, and that petitioner did not take appropriate remedial action but instead responded with intentional indifference amounting to intentional and wilful sex discrimination in violation of petitioner's obligations under Title IX as a recipient of federal financial assistance. *Id.* at 167-170.

Doe alleges that inappropriate sexual conduct by classmates began in late 1992 when a male classmate, M., pulled Doe onto his lap at school and "despite her

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[1] Doe also brought Title IX claims and a claim under 42 U.S.C. 1983, against various individual school and university officials, and alleged all defendants violated the Illinois Family Expense Act, 750 Ill. Comp. Stat. Ann. 65/15 (West 1993). Pet. App. 171-173. The district court dismissed the Title IX claims against the individual defendants, the Section 1983 claims, and the state law claims (*id.* at 82-85), and those claims are not before this Court.

struggle, unzipped her jeans in front of several other students." Pet. App. 152-153. Several weeks later, M. grabbed Doe's breasts under her sweater during lunch; on another occasion he tried to force his hands into her pants at the bus stop. *Id.* at 153. In January 1993, M. invited Doe to his home for a student gathering, but when Doe arrived there were no other students and M. sexually assaulted Doe. *Ibid.*

After Doe's parents complained to the parents of M., a popular basketball player at the school and the son of a university professor or administrator, M. precipitated a campaign of sexual harassment by a group of boys who called themselves the "posse." This campaign lasted for the remaining year and a half of Doe's schooling at University High, until her parents transferred her to a private school. Pet. App. 153. The posse wrote sexually derogatory comments about Doe and drew sexually oriented pictures of Doe on school desks, made sexual comments to her in the halls and in class, spit on her, and taunted her. *Id.* at 153-154. One boy exposed his genitals to her. *Id.* at 154.

Doe alleges that beginning in February 1993 she and her parents complained repeatedly to the principal and other school officials about the sexual harassment, but that school officials did not inform them about Title IX or refer them to any school official designated for investigating such complaints. Pet. App. 155-157. In March 1993, at an assembly, the school principal warned Doe's class to stop the harassment, but petitioner took no disciplinary action against the offending students. *Id.* at 155-156. When Doe and her mother spoke with a school counselor, the counselor blamed Doe. *Ibid.* Doe's father spoke with the principal on at least a monthly basis during the rest of that school year about the continued sexual harassment of Doe, but the

principal did nothing. *Ibid.* Continued complaints from Doe and her parents included a letter to the school counselor, reports to the school's assistant director, a request to see the school's rules and handbook (which had not been distributed for two years to the students or parents and which did not include a specific grievance procedure for sexual harassment claims), and a meeting with the principal requesting appropriate remedial measures for the following school year. The principal admitted that the school had no sexual harassment policy and he failed to offer any remedies. *Id.* at 156-157. Doe's parents ultimately went above the chain of command at the high school and spoke with University officials, including the vice chancellor, none of whom informed them of Doe's rights under Title IX. The university officials promised certain remedial measures by the school's officials the next year. *Id.* at 158.

In reliance on the promised remedial action, Doe returned to University High for another academic year. Doe alleges, however, that the promised remedies were never carried out. Pet. App. 157-158. When the new school year began, the school's assistant director read at an all-school assembly a list of prohibited sexual harassment behaviors "in a mocking manner which elicited laughter from the students." *Id.* at 158. A revised handbook specifically addressing sexual harassment was not distributed to students until May 1994. *Ibid.* The sexual harassment created a hostile environment which continued throughout the fall of 1993: classmates repeatedly made sexually degrading comments about Doe and her best friend, touched her sexually without her consent, and one boy made vulgar sexual gestures and exposed his buttocks to students during class. *Id.* at 159-160. Doe continued to report

the sexually harassing conduct to the school principal at the advice of the assistant director and a university official. *Ibid*. In or about October 1993, the principal suddenly left and an interim principal was appointed.

Only in January 1994, after the harassment had continued for a year, did petitioner's officials investigate Doe's allegations and take action against two of the students responsible. On January 21, Doe's parents met with the new principal to inform her about the assaults and sexual harassment campaign. The new principal said she had not been informed about it by school or university officials. Pet. App. 160-161. She found no written documentation of it in school records. *Id*. at 161. She told Doe's parents that the school was preparing a sexual harassment policy and procedure, notified them of the teacher designated to receive such complaints, and advised them to file a complaint with the teacher. They did not do so, because at the same time university officials had promised to initiate an investigation, and in fact they did so, interviewing numerous students on or about January 26. *Id* at 161-162. As a result, two of the posse boys were suspended for ten days. *Id*. at 162.

When other students threatened to retaliate against Doe and her friend, including suggesting that they be murdered, Doe asked the assistant director for protection, but he responded by scolding her for making allegations that could adversely affect the two boys' futures. Pet. App. 162. Doe's mother reported additional death threats against Doe to the principal and the assistant director but nothing was done. *Id*. at 163. Complaints by Doe's parents to the university liaison and other university officials were unavailing. The teacher newly appointed to handle harassment complaints ignored messages from Doe's mother and re-

fused to speak with her, and tried to dissuade Doe from filing a formal complaint against one of the boys based on continued harassment after his return from suspension. *Id.* at 164-165. At a meeting at the end of May 1994 with the various school and university officials, the officials were not supportive or encouraging about prospects for remedial measures the next year. Doe's parents removed her from the school at the end of that school year and enrolled her in a private school in another State. *Id.* at 167, 169.

Doe alleges that, as a result of the harassment and petitioner's intentional indifference to her complaints and its failure to remedy the sexually hostile educational environment, she has suffered severe mental and emotional distress, including depression, an inability to concentrate at school, and suicidal tendencies. Pet. App. 154, 168. In February 1993, Doe began ongoing psychological counseling. *Ibid.*

2. The district court dismissed Doe's Title IX claims without prejudice on the ground that she failed to allege that petitioner's knowing inaction resulted from its intent to discriminate against Doe on the basis of sex. Pet. App. 83; see *id.* at 127-128. The district court certified the Title IX issue for immediate interlocutory appeal pursuant to 28 U.S.C. 1292(b). Pet. App. 77-79.

After this Court's decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), petitioner moved for reconsideration of the district court's Title IX ruling, seeking a dismissal with prejudice on the ground that the court lacked jurisdiction over the Title IX claims. Petitioner contended that the abrogation of Eleventh Amendment immunity for purposes of Title IX, which is contained in the Civil Rights Remedies Equalization Act, 42 U.S.C. 2000d-7, was not a valid waiver of the state university's Eleventh Amendment immunity from

suit for damages under Title IX. Pet. App. 73-74. The district court denied that motion, ruling that the abrogation contained in Section 2000d-7 was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment, noting that "[p]rohibiting arbitrary or discriminatory government conduct is the 'very essence' of the guarantee of equal protection under the Fourteenth Amendment." Pet. App. 76-77. The court also denied petitioner's motion for certification under 28 U.S.C. 1292(b) of an interlocutory appeal on the Eleventh Amendment claim. Pet. App. 79.

3. Doe appealed the district court's dismissal of her Title IX claim, and petitioner appealed the denial of its motion for reconsideration of its Eleventh Amendment defense. Pet. App. 5. The two appeals were consolidated. The United States intervened as appellee to defend the constitutionality of the Eleventh Amendment abrogation in 42 U.S.C. 2000d-7, as applicable to Title IX. See Pet. App. 1, 5. The United States also addressed the substantive Title IX issue, as amicus curiae in support of Doe. The court of appeals reversed the order dismissing Doe's Title IX claim and affirmed the order rejecting petitioner's Eleventh Amendment argument. *Id*. at 1-37.

a. The court of appeals held that "a Title IX fund recipient may be held liable for its failure to take prompt, appropriate action in response to student-on-student sexual harassment that takes place while the students are involved in school activities or otherwise under the supervision of school employees, provided the recipient's responsible officials actually knew that the harassment was taking place." Pet. App. 18; see also *id.* at 59-60 (Evans, J., concurring). The court held that such a failure to take appropriate steps in response to

known sexual harassment is intentional discrimination on the basis of sex of the sort Title IX prohibits. *Id.* at 18. The court emphasized that the institution's liability should be measured, not by its success in eradicating harassment, but by the reasonableness of its efforts to do so. "As long as the responsive strategy chosen is one plausibly directed toward putting an end to the known harassment, courts should not second-guess the professional judgments of school officials. In general terms, it should be enough to avoid Title IX liability if school officials investigate aggressively all complaints of sexual harassment and respond consistently and meaningfully when those complaints are found to have merit." *Id.* at 35; see also *id.* at 61 (Evans, J., concurring) ("Considerable deference, I believe, must be given to schools in meeting these demands, and a wide range of reasonable responses should be permitted.").

In an opinion concurring in part and dissenting in part (Pet. App. 37-59), Judge Coffey agreed that Doe had stated a claim for a violation of Title IX, which "impose[s] liability upon fund recipients for failing to take prompt, appropriate remedial action in response to complaints of student-on-student sexual harassment, provided that responsible officials had actual knowledge of such harassment." *Id.* at 37. He disagreed in part, however, with the majority's articulation of the liability standard and sought to clarify certain ambiguities he perceived in the majority opinion. *Id.* at 38. He contended, *inter alia*, that "the proper question is whether" the action taken in response to complaints of harassment "was of such a nature that it effectively evinced the school's intent to perpetuate a sexually-hostile environment," which could be demonstrated where the institution's "response was so de minimis that it evidenced an endorsement of the harassment";

where the institution treated complaints differently based upon the sex of the complainants; or where the institution "departed from established policies and practices when punishing student harassers." *Id.* at 43-44 (footnotes omitted).

All three members of the panel recognized that the educational institution's liability arises not out of responsibility for the actions of the harassing students, but for its own failure to respond to the harassment. Pet. App. 32; see *id.* at 51-52 (Coffey, J., concurring in part and dissenting in part); *id.* at 59-60 (Evans, J., concurring).

b. With regard to petitioner's Eleventh Amendment defense, the court of appeals held that Congress validly abrogated the States' Eleventh Amendment immunity under Title IX when it enacted the Civil Rights Remedies Equalization Act, 42 U.S.C. 2000d-7. Pet. App. 5-15; *id.* at 37 (Coffey, J., concurring in part and dissenting in part). The court noted that petitioner "concedes, as it must, that Title IX and the Equalization Act, read together, unequivocally state Congress's intent to abrogate the States' Eleventh Amendment immunity." *Id.* at 7. And the court held that the abrogation constituted a valid exercise of congressional power under Section 5 of the Fourteenth Amendment. The court pointed out that, in *Seminole Tribe* v. *Florida*, 517 U.S. 44, 63-73 (1996), this Court overruled its ruling, in *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), that the Interstate Commerce Clause authorized Congress to abrogate the States' Eleventh Amendment immunity. But *Seminole Tribe* also made it clear that Congress is authorized by Section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunity. 517 U.S. at 58-60, 71 n.15. Reaffirming the Seventh Circuit's pre-*Seminole* holding in *EEOC* v.

Elrod, 674 F.2d 601 (1982), the court of appeals rejected petitioner's contention that, in this context, congressional intent to exercise its Fourteenth Amendment authority must be unambiguously expressed in the statute. Pet. App. 9-14. The proper inquiry, the court held, is whether the objectives of the statute were within Congress's authority under the Fourteenth Amendment. *Id.* at 14. In the case of Title IX, "[t]he answer is, quite plainly, that they were." *Ibid.* "Prohibiting arbitrary, discriminatory governmental conduct . . . is the very essence of the guarantee of 'equal protection of the laws' of the Fourteenth Amendment." *Id.* at 15 (quoting *Elrod*, 674 F.2d at 604) (internal quotation marks omitted). The express abrogation of the States' Eleventh Amendment immunity from suit in 42 U.S.C. 2000d-7, therefore, was a proper exercise of Congress's Section 5 powers. Pet. App. 15.[2]

c. Because the panel's decision conflicted with the decisions of other circuits, it was circulated among all active judges of the Seventh Circuit pursuant to Seventh Circuit Rule 40(e), but a majority of the judges did not favor rehearing en banc. Pet. App. 2 n.*.[3]

Judge Easterbrook issued a statement respecting the denial of rehearing en banc, emphasizing that the panel's holding that "failure to protect pupils from private aggression is a species of discrimination" is based on "the original meaning of equal protection of

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[2] In light of its ruling that Congress validly abrogated Eleventh Amendment immunity in enacting 42 U.S.C. 2000d-7, the court did not address Doe's alternative argument that petitioner waived its Eleventh Amendment immunity by accepting federal funds under Title IX. Pet. App. 15.

[3] The court of appeals also denied petitioner's petition for rehearing and suggestion for rehearing en banc. Pet. App. 134-135.

the laws." Pet. App. 62. He noted that no active member of the court expressed disagreement with that ruling. Rather, the disagreement involved only the level of knowledge and response required to be shown on the part of school officials in order to warrant imposition of liability. Judge Easterbrook thought en banc review of that issue neither necessary nor appropriate, because it was not clear in this case that the standard of liability would make any difference. *Id.* at 64.

Chief Judge Posner (joined by Flaum & Manion, JJ.), filed an opinion dissenting from the denial of rehearing en banc. Pet. App. 64-68. He agreed that an educational institution could be held liable for its failure to respond adequately to known instances of sexual harassment by students, but he believed that the majority's articulation of the standard for such liability might permit an institution to be held liable based solely upon a negligence standard. *Id.* at 65-66. To avoid this possibility, he "tentatively" advocated adoption of a standard of "deliberate indifference." *Id.* at 65.

No member of the court favored review by the full court of the Eleventh Amendment ruling. Pet. App. 62 (statement of Easterbrook, J.).

DISCUSSION

Petitioner seeks review of both rulings by the court of appeals: that Doe stated a claim for a violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, and that Congress's enactment of 42 U.S.C. 2000d-7 to abrogate the States' Eleventh Amendment immunity from suit under Title IX was a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

With respect to petitioner's contention that Doe failed to state a claim under Title IX, the petition should be held pending this Court's decision in *Davis* v. *Monroe County Board of Education*, cert. granted, No. 97-843, September 29, 1998, and disposed of in accordance with that decision or alternatively denied. In all other respects, the petition should be denied.

1. The Title IX issues raised by petitioner are likely to be resolved when this Court issues its decision in *Davis*. Like respondent Doe, the plaintiff in *Davis* brought a Title IX action against the entity responsible for the operation of her school based upon allegations that school officials had actual knowledge that she was subjected to sexual harassment by a fellow student, and responded with deliberate indifference. See *Davis* v. *Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997) (en banc). The question before the Court in that case is whether a school board can be liable under Title IX for responding with deliberate indifference to a student's repeated complaints about severe and pervasive sexual harassment by another student. Therefore, it would be appropriate for the petition in this case to be held pending this Court's decision in *Davis*, and disposed of in light of the decision in that case.

In the alternative, the Court should deny review of petitioner's Title IX claims. Because of the interlocutory nature of the decision below, review of the court of appeals' ruling at this stage is not warranted. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (denying petition for certiorari because court of appeals had remanded the case and it was thus not ripe for review); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases," review on certiorari is reserved for final judg-

ments). As Judge Easterbrook noted (Pet. App. 63), no member of the Seventh Circuit sought reconsideration of the panel's holding that failure to protect students from sexual harassment by other students is a species of sex discrimination; the only disagreement related to the standard for imposing school liability, a question not ripe for review at this stage of the case.

Moreover, the court of appeals' ruling that Doe stated a claim for damages was correct. That ruling is fully consistent with the language of Title IX and with this Court's intervening decision in *Gebser* v. *Lago Vista Independent School District*, 118 S. Ct. 1989 (1998). As we explain in our brief *amicus curiae* at the petition stage in *Davis*, the Court in *Gebser* addressed the circumstances under which an educational institution receiving federal funds may be held liable in damages in an implied right of action under Title IX when a teacher sexually harasses a student. The Court concluded that damages could be recovered in such a case only when "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs" and responds with deliberate indifference. *Id.* at 1999. The Court reasoned that, because Title IX's express remedial scheme permitting termination of federal funds is predicated on notice and an opportunity for the recipient to rectify a violation, Congress also did not intend to subject recipients of federal financial assistance to damages liability when the recipient "was unaware of discrimination in its programs and is willing to institute prompt corrective measures." *Ibid.*

The *Gebser* Court's ruling about the educational institution's potential liability did not depend upon the

harasser's status as an employee. In fact, the Court expressly rejected arguments that liability should be based on agency principles of respondeat superior or constructive notice that result from the employer-employee relationship. 118 S. Ct. at 1995, 1997. Rather, the Court emphasized that the educational institution's liability rests on its own "official decision * * * not to remedy the violation," not on the independent actions of its harassing employees. *Id*. at 1999.

It follows from that analysis that when school officials know that severe, persistent, or pervasive sexual harassment of a student is occurring under their education programs or activities, their failure to exercise their authority to address the harassment fosters a hostile educational environment and constitutes a violation of Title IX, whether the student's harasser is a school employee or another student. In either case the student is required to attend school in a discriminatorily hostile or abusive environment. When school officials knowingly fail to remedy a sexually hostile or abusive environment in an education program or activity, they "subject" harassed students to that environment in violation of Title IX. And *Gebser* makes clear that, when a school district responds with deliberate indifference to known incidents of sexual harassment of a student, it discriminates against that student in violation of Title IX, and the Spending Clause prerequisite for damages under Title IX is met. 118 S. Ct. at 1998-1999.

Doe's allegations meet the *Gebser* standard. She alleges that she was subjected to a campaign of harassment at the school by other students for three school semesters (Pet App. 153-154, 159-160, 162-164, 166); that teachers, the principal, the assistant director, and her counselor at University High School, as well as

numerous University officials, had actual knowledge of the harassment (*id.* at 153-158, 160-167); and that petitioner's officials responded with intentional indifference, taking little or no action in response to her and her parents' repeated complaints (*id.* at 149, 168); see also *id.* at 157 (also alleging deliberate indifference); *id.* at 170 (alleging reckless indifference). Because Doe alleged that "official[s] of the recipient entity with authority to take corrective action to end the discrimination" had actual knowledge of the harassment and failed to act to stop it, *Gebser*, 118 S. Ct. at 1999, she has stated a claim for damages under Title IX.

2. The Court should deny review of the court of appeals' ruling that Congress's enactment of 42 U.S.C. 2000d-7 to abrogate the States' Eleventh Amendment immunity from suit under Title IX was a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment. The courts of appeals that have addressed this question since *Seminole Tribe* have agreed that the abrogation of Eleventh Amendment immunity in 42 U.S.C. 2000d-7,[4] which is applicable not only to Title IX but also to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and Section 504 of the

[4] Section 2000d-7 provides in pertinent part:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

Rehabilitation Act of 1972, 29 U.S.C. 794, is a valid exercise of Congress's Section 5 powers.[5]

The court of appeals' ruling is correct. In *Seminole Tribe*, this Court articulated a two-part test to determine whether Congress has properly abrogated the States' Eleventh Amendment immunity (517 U.S. at 55) (citations, quotations, and brackets omitted):

> first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power.

Petitioner does not dispute (see Pet. 21) that the first requirement is satisfied here. Nor could it. In 42 U.S.C. 2000d-7, Congress expressly stated its intent to abrogate the States' Eleventh Amendment immunity.[6] Petitioner also does not contend that the enactment of Section 2000d-7 is beyond the scope of Congress's powers under Section 5 of the Fourteenth Amendment

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[5] See *Lesage* v. *Texas*, No. 97-50454, 1998 WL 717230 (5th Cir. Oct. 13,1998) (Title VI); *Crawford* v. *Davis*, 109 F.3d 1281 (8th Cir. 1997) (Title IX); *Franks* v. *Kentucky Sch. for the Deaf*, 142 F.3d 360 (6th Cir. 1998) (Title IX); *Clark* v. *California*, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998) (Section 504). This is the same conclusion courts reached prior to *Seminole Tribe*. See *United States* v. *Yonkers Bd. of Educ.*, 893 F.2d 498, 503 (2d Cir. 1990); *Santiago* v. *New York State Dep't of Correctional Servs.*, 945 F.2d 25, 31 (2d Cir. 1991) (dictum), cert. denied, 502 U.S. 1094 (1992).

[6] See *Lane* v. *Pena*, 518 U.S. 187, 200 (1996) (Section 2000d-7 is "an unambiguous waiver of the States' Eleventh Amendment immunity"); *Gebser*, 118 S. Ct. at 1996; *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 72 (1992); *id.* at 78 (Scalia, J., concurring).

(see Pet. 23-24).[7] Such a contention would be frivolous because prohibiting gender-based discrimination by state actors is clearly within Congress's powers under the Fourteenth Amendment.[8]

Relying upon *Gregory* v. *Ashcroft*, 501 U.S. 452, 469 (1991), and *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 16 (1981), petitioner contends (Pet. 21-24) that the abrogation in Title IX is invalid because Congress did not state expressly that it was exercising its powers under the Fourteenth Amendment. This Court rejected a similar argument in *EEOC* v. *Wyoming*, 460 U.S. 226, 243-244 n.18 (1983):

> It is in the nature of our review of congressional legislation defended on the basis of Congress' powers under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words "section 5" or "Fourteenth Amendment" or "equal protection," * * * for "[t]he constitutionality of action taken by Congress does not depend on

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[7] Petitioner conceded below that it did not "dispute that Congress *could have* enacted 42 U.S.C. § 2000d-7 under its Fourteenth Amendment powers." Combined Reply and Response Brief of Defendant-Appellant-Cross Appellee The Board of Trustees of the University of Illinois at 6.

[8] In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976), this Court held that Congress has the power to abrogate Eleventh Amendment immunity for sex discrimination claims pursuant to Section 5 of the Fourteenth Amendment. *Seminole Tribe* reaffirmed the holding of *Fitzpatrick*. See 517 U.S. at 59, 65-66, 71 n.15; cf. *United States* v. *Virginia*, 116 S. Ct. 2264, 2274-2276 (1996).

> recitals of power which it undertakes to exercise."

Id. at 243-244 n.18 (citing *Fullilove* v. *Klutznick*, 448 U.S. 448, 476-478 (1980) (Burger, C.J.), and quoting *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)); see *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 453 n.9 (1976) (relying on legislative history in determining whether "Congress exercised its power under § 5 of the Fourteenth Amendment").[9]

As the Court explained in *Wyoming*, 460 U.S. at 244 n.18, *Pennhurst* involved the construction, not the constitutional validity, of a federal statute. Similarly, in *Gregory*, this Court was confronted with ambiguous statutory language and was attempting to determine its meaning. It held that a "plain statement" would be required before it would interpret a federal statute to

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[9] The legislative history of Section 2000d-7 makes it clear that Congress intended to exercise its Fourteenth Amendment powers in enacting that provision. Senator Cranston, the provision's primary sponsor, described the proposed legislation as "clearly authorized" by both the Spending Clause and Section 5 of the Fourteenth Amendment. 131 Cong. Rec. 22,346 (1985). The Senate Committee Report likewise referred to both of those constitutional provisions as permitting abrogation of state immunity. See S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986). After the Senate version of the bill was adopted in conference, Senator Cranston submitted for the record a letter from the Department of Justice stating that

> [t]he proposed amendment * * * fulfills the requirements that the Supreme Court laid out in Atascadero. Thus, to the extent that the proposed amendment is grounded on congressional powers under section five of the fourteenth amendment, [it] makes Congress' intention "unmistakably clear in the language of the statute" to subject States to the jurisdiction of Federal courts.

132 Cong. Rec. 28,624 (1986) (citations omitted).

"upset the usual constitutional balance of federal and state powers." 501 U.S. at 460. In so holding, it noted that the *Pennhurst* rule was a "rule of statutory construction to be applied where statutory intent is ambiguous." *Id.* at 470; see *United States* v. *Culbert*, 435 U.S. 371, 379 (1978); cf. *Pennsylvania Dep't of Corrections* v. *Yeskey*, 118 S. Ct. 1952, 1954 (1998).

There is no ambiguity about Congress's intent to abrogate the States' Eleventh Amendment immunity in Title IX actions. Section 2000d-7 contains an unambiguous statement of such congressional intent. "Here, there is no doubt what the intent of Congress was: to extend the application of the [Act] to the States. The observations in *Pennhurst* therefore simply have no relevance to the question of whether, in this case, Congress acted pursuant to its powers under § 5." *Wyoming*, 460 U.S. at 244 n.18.[10]

Petitioner also contends (Pet. 24-28) that the cause of action recognized by the court of appeals exceeds Congress's authority under the Fourteenth Amendment and therefore is inconsistent with its finding of a valid abrogation of Eleventh Amendment immunity. Relying

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[10] The abrogation of Eleventh Amendment immunity may also be upheld on the ground that petitioner waived its immunity when it accepted federal funds. See *Clark* v. *California*, 123 F.3d at 1271 ("One way for a state to waive its immunity is to accept federal funds where the funding statute 'manifest[s] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity.' * * * In this case, the Rehabilitation Act manifests a clear intent to condition a state's participation on its consent to waive its Eleventh Amendment immunity." (quoting *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 247 (1985))). As noted above, see note 2, *supra*, the court of appeals did not reach this argument because of its rejection of petitioner's argument on other grounds.

on *City of Boerne* v. *Flores*, 117 S. Ct. 2157 (1997), petitioner argues that Congress lacks the authority to enact legislation that exceeds the substantive guarantees of the Fourteenth Amendment. Thus, it argues, because a violation of the Equal Protection Clause requires proof of discriminatory intent, no abrogation of Eleventh Amendment immunity is valid for a cause of action under Title IX that does not require such a showing of intent.

Petitioner's argument is of no relevance to this case because the court of appeals held that Doe's allegations, which must be taken as true at this juncture of the case, *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974), constitute allegations that petitioner or its officials intentionally discriminated against Doe on the basis of sex. Pet. App. 18. The court held that Doe's allegation that petitioner or its officials failed "promptly to take appropriate steps in response to known sexual harassment is itself intentional discrimination on the basis of sex," *ibid.*, thereby satisfying any requirement that intentional discrimination be alleged.[11]

Moreover, this case would present a poor vehicle for the Court's review of petitioner's *City of Boerne* claim because the court of appeals did not address the matter

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[11] The court of appeals explained that Doe's allegation of intentional sexual discrimination "assumes that the combination of knowledge that sexual harassment is occurring in activities under the school's control and intentional failure to take prompt, appropriate action (such as investigation and, if warranted, disciplinary measures) is presumably, perhaps even necessarily, a manifestation of intentional sex discrimination. * * * After all, what other good reason could there possibly be for refusing even to make meaningful investigation of such complaints, as Jane Doe alleges University High officials did in this case?" Pet. App. 23 (citations omitted).

due to the fact that petitioner raised it for the first time in its petition for rehearing with suggestion for rehearing en banc. See *Hoover* v. *Ronwin*, 466 U.S. 558, 574 n.25 (1984) (declining to consider argument made for the first time in response to a petition for rehearing); *Yeskey*, 118 S. Ct. at 1956 (declining to consider argument not raised before or addressed by court of appeals).

In any event, the premise of petitioner's contention is wrong. Section 5 authorizes Congress to enact legislation that "deters or remedies constitutional violations * * * even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legisative spheres of autonomy previously reserved to the States.'" *City of Boerne*, 117 S. Ct. at 2163 (quoting *Fitzpatrick* v. *Bitzer*, 427 U.S. at 455). While *City of Boerne* made it clear that Congress does not have the authority to "decree the substance of the Fourteenth Amendment's restrictions on the States," 117 S. Ct. at 2164, it reaffirmed earlier holdings that Congress may enact legislation intended to prevent or remedy constitutional violations, as long as there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Ibid.*

The cause of action for damages recognized by the court of appeals here—and by this Court in *Gebser*—is well within Congress's authority to remedy and prevent constitutional violations. As this Court recognized in *Gebser*, "harassment unfortunately is an all too common aspect of the educational experience." 118 S. Ct. at 2000. And the standard of liability adopted in that case—which requires recipients of federal financial assistance to respond with something more than deliberate indifference when they have actual knowledge of sexual harassment in their educational programs—was

intended to implement the basic Title IX goal of "prevent[ing] recipients of federal financial assistance from using the funds in a discriminatory manner." *Ibid.* Such a cause of action is a permissible legislative means of remedying and preventing unconstitutional sex discrimination by public actors.

CONCLUSION

With regard to petitioner's contention that Doe failed to state a claim under Title IX, the petition for a writ of certiorari should be held pending this Court's decision in *Davis* v. *Monroe County Board of Education*, No. 97-843, and disposed of in accordance with the decision in that case or, alternatively, denied. In all other respects, the petition should be denied.

Respectfully submitted.

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